United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

358

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,725

BEVERLY J. RODGERS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court

for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 4 1968

Nathan J. Paulson
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QUESTIONS PRESENTED

1. Whether the search made of appellant's belongings before his arrest, a photograph of which was introduced as Exhibit 1 at the hearing upon his motion to suppress evidence, was in violation of his rights under the Fourth Amendment.

2. Whether the search of appellant's person at the Seventh Precinct was incident to an unlawful arrest and hence violated his rights under the Fourth Amendment.

3. Whether the commission of several additional errors, such as permitting redirect testimony of appellee's witness to exceed the scope on cross-examination, allowing a witness for appellee to be present in the courtroom during cross-examination of appellant, and failing to instruct the jury adequately as to the meaning of "authorized depository for mail", constituted reversible error.

This case has not previously been before this Court.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BEVERLY J. RODGERS, Appellant,	)	
v.	)	No. 21,725
UNITED STATES OF AMERICA, Appellee.	)	

BRIEF FOR APPELLANT

I. JURISDICTIONAL STATEMENT

This Court has jurisdiction of the appeal under 28 U.S.C. §1291.

II. STATEMENT OF THE CASE

The appellant, Beverly J. Rodgers, age 74, was apprehended in mid-morning of December 17, 1966, at 1257 Wisconsin Avenue, N. W., Washington, D. C. He was taken to the Seventh Precinct, where, during a strip search, certain items of mail belonging to others were supposedly found upon his person. Appellant was charged with the violation of Section 1708 of Title 18 of the United States Code, dealing with taking articles from an authorized depository for mail and having the same in his possession.

A preliminary hearing was held on December 19, 1966, before Judge Edward A. Beard of the Court of General Sessions. A motion for the return of property and the suppression of evidence (i.e., the mail material) under

Rule 41(e), F.R.C.P., was heard and denied by Judge John J. Sirica of the United States District Court for the District of Columbia on September 1 and 22, 1967. At this hearing, the appellee introduced as Exhibit 1 a photograph of various articles taken from appellant's bags and his person (Tr. motion to suppress 20). Trial of the appellant occurred on September 28 and October 2, 1967, before Judge Burnita Matthews of the District Court, at which trial counsel for appellant renewed his motion to suppress and was again denied. A jury found the defendant guilty on all counts, and the defendant was sentenced on December 1, 1968, to a term of from one to four years. All transcripts of the aforementioned proceedings are a part of this record.

From these transcripts, the events concerning the appellant's arrest are, as follows. The premises, 1257 Wisconsin Avenue, are a three-story apartment house half a block above M Street (Tr. preliminary hearing 10). The front door was unlocked, and the lobby, about six by four feet, was wide open to the public and to callers such as postmen; newsboys, milkmen, icemen, and the like (Tr. preliminary hearing 11 and 12).

The appellant's testimony, which nothing in the record contradicts, is that he had come from Charlotte, North Carolina, the night before the morning of December 17, 1966 (Tr. trial 99). Appellant made his living selling new and used articles (Tr. trial 126). He had something to eat in a restaurant, got in his car, and parked it on M Street in Georgetown. He was looking for a room. He had some of his belongings with him since in case he got an apartment, he could move right in (Tr. trial 100). He entered 1257 Wisconsin Avenue, the door being wide open, and looked for a

sign that might indicate the janitor or owner of the building (Tr. trial 100 and 101). He could not locate either and hearing someone talking on the third floor, went up there and knocked on the door of a Mrs. Bromley (Tr. motion to suppress 24). The appellant asked her where he could find the janitor or owner so that he might rent an apartment or room. Mrs. Bromley replied through the door that she did not know where he could find them (Tr. motion to suppress 14). The appellant thanked her, picked up his two bags, and started to move on, when one slipped out of his hand and everything went all over the stairs (Tr. motion to suppress 14). The appellant put his things back in the bag and started down the stairs, at which point two policemen arrived in response to a call from Mrs. Bromley. The policemen took the appellant back upstairs to Mrs. Bromley. She and her whole family and others came out to see what was going on. According to appellant, Mrs. Bromley said that she didn't open the door for the simple reason that they had been having trouble with teenagers and that she was frightened and called the police to be on the safe side (Tr. motion to suppress 15). According to appellant, Mrs. Bromley also said that if she had known it was an old man, she would have opened the door and talked to him. One of the officers told the appellant to leave the building and not to come back looking for an apartment. The appellant said all right. The other officer ordered the appellant to leave his bags where they were and asked him what he had in them (Tr. motion to suppress 16). The appellant named everything in them, but the officer was not satisfied and took it upon himself to take everything out of the bags and put them on the floor (Tr. preliminary hearing 21, 22; tr. motion to suppress 16; tr. trial 107).

The officers had no warrant to search appellant or to arrest him (Tr. trial 10, 11), and appellant protested the search (Tr. motion to suppress 16). Then one officer told appellant he was under arrest (Tr. trial 107 and 108). Appellant asked the officer what the charge was. The officer replied that he did not know until they get to the police station (Tr. trial 108).

The record does not contradict appellant that his bags were searched before the arrest. However, there is much confusion as to the nature of the charge when it was made. As was stated, appellant testified that the officers did not give him the specific reason for his arrest. The arresting officers, Privates Vogel and Vigrass of the Seventh Precinct, did not appear at the trial but, instead, testified singly at the preliminary hearing and at the motion to suppress. Private Harry Vogel testified at the preliminary hearing (page 5 of tr.) that he told the appellant he was under arrest for unlawful entry. This was denied by the appellant. Private Vogel further testified that after placing him under arrest (for unlawful entry), he noticed several bulges in appellant's pocket and that in the first one he searched, he found a knife and other numerous articles (Tr. preliminary hearing 5). But Private Vogel did not ascribe the knife as the reason he arrested appellant.

The possession of a sort of knife was admitted by the appellant (Tr. trial 107). The appellant testified that the knife was an envelope knife, one of those you find on desks to open envelopes that they have in the coffee shop at the YMCA (Tr. trial 107, 108). The knife was not introduced in evidence in any proceedings herein. Counsel for appellant examined this

"knife" in the storeroom of the property clerk in the Municipal Center and of his own knowledge states that it is a letter opener (Property Report D80640). It is, in fact, a cheap letter opener, having an imitation stag handle and a slightly tapering blade about five inches long and three-eighths of an inch wide with rounded edges and point. It was enclosed in an imitation leather scabbard.

Later, at the motion to suppress, the cause for arrest, if any, seems to have been changed. Private Vigrass testified that a bone-handled hunting knife with a 5 1/2 or 6 inch blade in a leather case, poked out of a pocket as appellant sat his bags down on the steps to talk (Tr. motion to suppress 33). Private Vigrass stated that appellant was arrested for CDW, the knife (Tr. motion to suppress 32) but did not state whether he informed the appellant of the grounds for his arrest. Further, on cross-examination Private Vigrass testified that the appellant was not engaged in doing anything illegal other than standing on the second or third step from the third floor of the building (Tr. motion to suppress 36).

Trial counsel for appellant, Clement Cooper, Esquire, tried to obtain a transcript of the preliminary hearing at the time of the motion to suppress and through the court renewed his efforts at the trial (Tr. trial 98), when he again moved to suppress the evidence. The trial proceeded, and trial counsel did not have the benefit of seeing the clear contradiction between the testimony of Privates Vogel and Vigrass nor of the true basis for appellant's arrest.

Thus, it appears from the evidence that: (1) appellant's bags were searched prior to any arrest; (2) if appellant was arrested on any specific charge, it was for unlawful entry (see argument of the appellee, beginning

at page 14, Tr. preliminary hearing, on this issue only); and (3) if he was arrested for concealing a deadly weapon, he was not so told.

At the preliminary hearing, counsel for the appellant introduced the issue whether the arresting officers had probable cause. Judge Beard ruled that he was unable to pass upon the legality of evidence obtained from an unlawful search and to exclude it from evidence, this being a problem for the District Court (Tr. preliminary hearing 16). But Judge Beard had a definite opinion that "it was very likely an unlawful arrest" (Tr. preliminary hearing 18).

After the scene at 1257 Wisconsin Avenue, during which appellant's person was thoroughly searched, he was led away to the Seventh Precinct. There, he was forced to undergo a strip search, when two detectives connected with this precinct allegedly found the mail material with respect to which the appellant was convicted.

At the trial, counsel for appellee examined the people whose mail appellant allegedly stole. In one instance, on redirect examination counsel for appellee asked a Mr. Richard Hughes Stanton whether he gave appellee permission to accept or open his mail (Tr. trial 68). The cross-examination of Mr. Stanton by counsel for appellant covered only questions concerning the date Mr. Stanton first saw the bond reported stolen and the people who had shown him the bond (Tr. trial 67).

Further at the trial, there was testimony with respect to the type of mail depositories in which the mail allegedly stolen by appellant had been placed. In the case of Mr. Stanton it was an unlocked mailbox mounted on the wall in the vestibule just inside an unlocked front door.

(Tr. trial 66). In the case of Officer Harold F. Johnson, the depository was a table 25 to 30 feet inside the entrance of a rooming house (Tr. trial 72). In the case of Mr. A. L. Wheeler, it was a mailbox located in the back of an exposed vestibule leading to his office on the second floor (Tr. trial 74). Inspector Victor A. Kauffman of the Post Office Department testified that an authorized depository for mail is a "mailbox or any place where any mail is customarily left for delivery to addressees", the basis thereof being a postal regulation (Tr. trial 85). Judge Matthews, in her instructions to the jury, stated that "an authorized depository for mail includes, among other things, a letter box or mail receptacle or other authorized depository designated by postal regulations" (Tr. trial 150).

One of the rebuttal witnesses for the appellee at the trial was Detective James E. Owens of the Seventh Precinct (Tr. trial 128). The testimony of the appellant suggests that Detective Owens was in the courtroom at the time appellant was being cross-examined (Tr. trial 121).

III. STATUTES INVOLVED

Title 18, U.S.C. §1708

Title 22, Section 3102 D.C. Code

Title 22, Section 3204 D.C. Code

Title 23, Sections 301 and 306 D.C. Code

IV. STATEMENT OF POINTS

1. A search was made of appellant's belongings before arrest in violation of the Fourth Amendment to the Constitution. A photograph

thereof was introduced at his motion for return of property and suppression of evidence. Said evidence was prejudicial to appellant and in violation of his rights against self-incrimination.

2. Appellant's arrest for unlawful entry, the only charge for which he may have been arrested, was unreasonable and without probable cause. Hence, his search incident to this arrest was unlawful, and conviction supported by this evidence should be reversed.

3. Reversible error occurred when during the trial the Court permitted testimony on redirect examination beyond the scope of the cross-examination, permitted a rebuttal witness of the appellee to remain in the courtroom during the cross-examination of the appellant, and failed in instructing the jury to clarify the meaning of the term, authorized depository for mail, as set forth in 18 U.S.C. §1708.

V. SUMMARY OF ARGUMENT

1. The Fourth Amendment protects our citizens against searches and seizures that are unreasonable and without probable cause. Such a search and seizure occurred before appellant's arrest, and a photograph of the things seized was introduced at his motion to suppress. The introduction of this photograph violated appellant's rights under the Fourth Amendment.

2. The court below improperly denied the renewal of appellant's motion to suppress evidence. At the time of trial, counsel for appellant was not afforded the opportunity to obtain a transcript of the preliminary

hearing showing a conflict in testimony by the two arresting officers which the District Court would have been obligated to resolve. From the testimony at the preliminary hearing, appellant was arrested for unlawful entry. The facts show no probable cause for this arrest that was in the nature of an arrest for investigation. Appellant's search incident thereto at the Seventh Precinct was in consequence unlawful under the Fourth Amendment.

3. It is clear that the testimony of Mr. Richard Hughes Stanton, witness for the appellee, on page 68 of the trial transcript, was beyond the scope of his cross-examination by counsel for appellant. Furthermore, this testimony by Mr. Stanton supplied one of the missing elements of appellee's case, namely, whether he gave appellant permission to receive and open his mail.

Section 1708, Title 18 U.S.C., applies only for the taking of mail from, among other places, an authorized depository for mail matter. There is great doubt that at least one of the places, a table in a rooming house, from which appellant was supposed to have taken mail constituted an authorized mail depository and the trial judge's instructions to the jury thereon were not satisfactory in defining that term.

It also appears that Detective Owens of the Seventh Precinct was present in the courtroom during appellant's cross-examination. This procedure is strictly contrary to the rule on witnesses.

VI. ARGUMENT

General - The Fourth Amendment

The Fourth Amendment to our Constitution provides that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The history behind this provision is well known and documented. See the dissent by Justice Douglas in Draper v. United States, 358 U.S. 307, 314 (1959). The framers of our Constitution had no desire to subject the citizens of this country to the abuse possible by general warrants, in which the name of the citizen to be arrested was left blank, or by the French equivalent, the lettre de cachet, which emanated from the king and was countersigned by a minister, often to carry out personal vendettas. As the court said at p. 559 in Wrightson v. United States, 95 App. D.C. 390, 222 F.2d 556 (D.C. Cir. 1955):

"Such [unlawful] searches and seizures are the embryo of tyranny* * * Once those safeguards are gone, the supremacy of force is complete* * *."

The purpose of this amendment is to protect a citizen against

"* * *the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense* * *."

Boyd v. United States, 116 U.S. 616, 630 (1886). It is clear that this amendment, because of the breadth of the "due process" clause in the Fourteenth Amendment, applies to actions by either state or Federal officials. Mapp v. Ohio, 367 U.S. 643 (1961).

The Fourth Amendment does not prohibit all searches without a warrant. It is the unreasonable search and the search without probable cause that the Fourth Amendment prohibits. Arrests of individuals and

searches of automobiles can be reasonable when made without a warrant because they may flee in the time required to obtain a warrant. But all searches and arrests must be based upon probable cause, and this exists where

> "'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."

Draper v. United States, supra, at 313; Carroll v. United States, 267 U.S. 132, 162 (1925). Thus, before a police officer can make a search or an arrest, either with or without a warrant, he must show probable cause that a crime is being committed or about to be committed. Gatlin v. United States, 117 App. D.C. 123, 326 F.2d 666 (D.C. Cir. 1963); Wrightson v. United States, supra.; see also Sections 23-301 and 23-306 of the D. C. Code. Very important is the principal that probable cause requires reasonable grounds for belief of guilt, which means more than bare suspicion but less than evidence that would justify condemnation. Brinegar v. United States, 338 U.S. 160 (1949).

It has long been held that a search and seizure without a warrant is justified if incident to a lawful arrest, and the right to conduct the search and seizure under these circumstances extends only to the things under the immediate control of the accused. Preston v. United States, 376 U.S. 364 (1964); Weeks v. United States, 232 U.S. 383 (1914). The basis for this rule is practical. Police officers must have the right to search the accused, to take weapons and other things which might be used to assault the officer and allow him to escape, or to prevent the

destruction of evidence of the crime. It follows that, absent probable cause, if the seizure of the accused's things is not incident to a lawful arrest, the search violates the Fourth Amendment. United States v. Rabinowitz, 339 U.S. 56 (1950); Wrightson v. United States, supra.

Any conviction of the accused as a result of evidence seized in violation of his rights under the Fourth Amendment cannot be sustained. Harris v. United States, 331 U.S. 145 (1947). Our rights under this amendment are enforced by the denial to the prosecution of the use of any material seized in violation thereof.

Finally, the Fourth Amendment is to be liberally construed, and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. Go-Bart Importing Company v. United States, 282 U.S. 344 (1931).

1. Reversible Error Occurred When a Photograph of Appellant's Things Was Introduced at the Motion to Suppress.

From the Statement of the Case it appears uncontradicted that appellant was searched before arrest. His bags containing the numerous articles shown in the photograph introduced as Exhibit 1 in the motion to suppress were laid out in the hall of 1257 Wisconsin Avenue and examined by Privates Vogel and Vigrass of the Seventh Precinct. These contained such articles as watches, jewelry, radios, umbrella, slippers, and other things of a character consistent with his trade as a salesman and with the possession of an inexpensive envelope knife. There is no evidence here that this search was based upon probable cause that a crime was being or about to be committed (see argument 2, infra). And since the search

preceded the arrest, it cannot in this instance be incident to a lawful arrest. There is simply no relationship between the search and the grounds for appellant's arrest. The purpose of the search was patently to obtain evidence upon which a proper arrest might be made. Procedures such as this are highly unconstitutional.

It is difficult to assess the damage done to appellant by this photograph,* but we must assume it was intended by the appellee to be substantial since Exhibit 1 was the only one introduced at the motion to suppress. The innuendo by the appellee is plain that whom the police arrested was a person, suspicious and up to no good because he had two bags full of odd articles and that the police had probable cause to arrest such a person. The aura of suspicion created by this evidence was most certainly a factor in causing Judge Sirica to deny appellant's motion to suppress. In this light, the reception of the photograph in evidence is reversible error.

2. Reversible Error Occurred When the District Court Accepted as Evidence the Mail Material Found on Appellant's Person as Being Violative of his Rights Under the Fourth Amendment.

A search and seizure incident to a lawful arrest and without a warrant is acceptable under the Constitution. But the foundation for any such search must be a lawful arrest, which in turn means one supported by probable cause.

It is clear from the testimony that the appellant was arrested for unlawful entry. The argument of the U. S. Attorney at the preliminary hearing was on this point exclusively. It is extemely hard to see how

*There is no real distinction between the introduction of the photograph and the articles themselves.

the appellant had no right to be where he was when arrested. He walked through a wide open door and continued to the third floor trying to find the janitor or owner. This is not a case of an entry into a private home through a door and into hallways that are not public places. The hallway and stairs of 1257 Wisconsin Avenue were accessible to all sorts of people - mailmen, paperboys, milkmen, and the like. None of these would have required permission to enter the front door. There is no reason why appellant should not have been accorded a similar right. When apprehended, appellant was doing nothing unlawful.

Section 22-3102 of the D. C. Code, the misdemeanor for which appellant was arrested, punishes one who, without lawful authority, enters premises against the will, expressed verbally, or by sign of the lawful occupant. Bowman v. United States, 212 A.2d 610 (D.C. Ct. App. 1965). None of the elements of this misdemeanor were conceivably present in this case. No one expressed any objection to appellant's entry into or being in 1257 Wisconsin Avenue. He was at all times in public portions of the building, and he was leaving voluntarily when he was arrested. The facts show this arrest to be wholly unsupported by probable cause.

From the testimony at the preliminary hearing, it does not appear that appellant was either arrested for or told that he was arrested for concealing a knife. It seems that he was arrested to provide an opportunity for a thorough search at headquarters. This is characteristic of the arrest for investigation. Gatlin v. United States, supra. Even if the arrest had been made for concealing a deadly weapon, there was no probable cause. Appellant is an old man, 74 years of age. His bags and

his pockets were crammed with all kinds of salable articles. One of them happened to be a letter opener, which, strangely, the appellee did not introduce in evidence at the motion to suppress or at any other hearing. This letter opener is in no respect a deadly weapon, the carrying of which is prohibited by Section 22-3204 of the D. C. Code. This section does not require all knives to be considered "deadly or dangerous weapons". Degree v. United States, 144 A.2d 547 (Mun. Ct. App. D.C. 1958). And certainly its possession in the pocket of a frail old man is not enough to arouse the apprehension of a police officer that a crime is being committed or about to be committed. The appellant had threatened no one with his letter opener. He was merely leaving the building when he was arrested.

Only when the transcript of the preliminary hearing is read does the nature of appellant's arrest become evident. Trial counsel for appellant, through no fault of his own, was not given the opportunity of seeing a copy of this transcript. The trial court should not have denied counsel's renewed motion to suppress before all the facts concerning appellant's arrest had been brought to light.

Since the arrest of appellant at 1257 Wisconsin Avenue was without probable cause, his subsequent search at the Seventh Precinct was unlawful, and his conviction, based upon possession of the articles found there, cannot be allowed to stand.

3. Reversible Error Occurred When the Trial Judge Permitted an Improper Examination of One of Appellee's Key Witnesses, Failed to Instruct the Jury Satisfactorily as to the Meaning of the Term "authorized depository for mail", and Allowed a Witness for Appellee to be Present in the Courtroom During Appellant's Cross-examination.

Although the following procedures do not seem to have been objected to by counsel for appellant, they seem to have coalesced to make the whole trial prejudicial to him. Testimony on redirect examination by Mr. Richard H. Stanton, which should not have been permitted, squarely supplied one of the bases for the appellee's case. His testimony on redirect examination to the effect that he did not give appellant permission to receive or open his mail, was far beyond the scope of the cross-examination. One of the places from which the appellant was supposed to have stolen mail was from a table inside of a private rooming house. It is very doubtful that this is an authorized mail depository. For example, in United States v. Askey, 108 F. Supp. 408 (S.D. Tex. 1952), letters pushed through a mail slot on a door and taken from the floor were not taken from an authorized depository for mail matter. This conclusion stems from the fact a floor is not a "receptacle" within the meaning of Title 39, C.F.R. Section 153.7(a), as follows:

> "DESIGNATION AS AUTHORIZED DEPOSITORY. Every letterbox or other receptacle intended or used for the receipt or delivery of mail on any city delivery route, rural delivery route, star route, or other mail route is designated an authorized depository for mail within the meaning of 18 U.S.C. sections 1702, 1705, and 1708.

It is submitted that a table in a rooming house is not a receptacle as a matter of law. The trial judge in her instructions should have commented on the word "receptacle" and given the jury a better chance to consider whether mail was in fact taken from an authorized depository for mail.

It would appear from the appellant's testimony that he recognized Detective Owens as having been in the courtroom during his cross-examination. As a general proposition, this procedure places the accused

at a disadvantage and inhibits the giving of fresh and uncalculated testimony.

VII. CONCLUSION

Wherefore, the judgment of the District Court should be reversed as to all counts of the indictment and a new trial ordered.

Respectfully submitted,

November 1, 1968

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,725

BEVERLY J. RODGERS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ROBERT P. WATKINS,
Assistant United States Attorneys.

Cr. No. 290-67

United States Court of Appeals
for the District of Columbia Circuit

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* Cases chiefly relied upon are marked by an asterisk.

ISSUES PRESENTED

In the opinion of the appellee, the following issues are presented:

1) Whether there was probable cause for appellant's arrest when the officers responding to a report of a suspicious man knocking on doors at 1257 Wisconsin Avenue found appellant in the hallway at that address between the second and third floors unable to give a satisfactory explanation of his presence and with a large bonehandled hunting knife protruding from his pocket?

2) Whether the introduction in evidence at the hearing on the motion to suppress of the photograph of the numerous articles found in appellant's bags was prejudicial to the appellant's case and constituted reversible error?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,725

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v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted on March 13, 1967 on four counts of stealing mail from an authorized mail depository in violation of 18 U.S.C. § 1708 and four counts of unlawful possession of stolen mail. At a jury trial held from September 28, 1967 to October 2, 1967 before Judge Burnita S. Matthews, appellant was found guilty of all eight counts. He was sentenced to a term of from one to four years. It is from this sentence that appeal is taken.

The Preliminary Hearing

On December 19, 1967 at a preliminary hearing, Officer Harry Bogel testified before Judge Edward A. Beard that

when he responded to 1257 Wisconsin Avenue, N.W. he talked to a woman who said there was a strange man in the building. He saw appellant in the hall and asked him what he was doing there. Appellant replied that he was looking for a room. A Mrs. Bromley told Officer Bogel that she had heard a very light knocking at her door and called, "Who's there?" When she opened the door she saw appellant going down the stairs. (PH 2-4.) Officer Bogel then arrested appellant for unlawful entry. When Officer Bogel noticed a bulge in appellant's pocket he searched appellant and found a knife and a quantity of checks (PH 5). Judge Beard commented later on in the proceeding that the arrest looked to him to be "pretty unlawful" (PH 18).

Appellant testified that the officers said they were taking him in because "they just wanted to talk to him" but they did not tell him that he was under arrest. When they arrived at the station the detectives made him strip and searched him. (PH 22.) Appellant then testified that one of the policemen wanted him to sign his name to a check which was brought in from another room but he refused (PH 23-25). Appellant denied ever having seen the items which were the subject of the indictment. The court bound him over for the Grand Jury (PH 25).

Motion to Suppress

On September 1, 1967 appellant came before Judge John J. Sirica for a hearing on a *pro se* motion under Rule 41 (e) of the Federal Rules of Criminal Procedure for return of personal property and suppression of certain items of evidence. Defense counsel had no knowledge that such a motion had been filed and was therefore not prepared to argue it at that time, so the hearing was postponed for two weeks. (MS 2-8.)

On September 22, the hearing was held before Judge Sirica at which appellant testified that he entered 1257 Wisconsin Avenue because he was looking for an apartment. He knocked on a door and a woman responded but she would not open the door. He said that he wanted to

find the janitor so that he could rent an apartment. The woman replied through the still closed door that she did not know where to find him. (MS 12-14.) As he was leaving the building two policemen appeared and asked what he was doing. He told them he was looking for an apartment. They indicated that he must be the party about whom they received the complaint and took him upstairs. One of the policemen told him to leave, the other policeman told him to wait and then proceeded to search his bags. (MS 15, 16.) Then they took him to the precinct where his bags were examined again. Appellant then testified that he did not have any of the checks referred to in the indictment on his person and that he knew nothing about them until he was told about the charge at the jail. (MS 18, 23.)

The Government had a photograph of the items that were found when appellant was searched at the police station marked for identification. However, the photograph was not entered in evidence and no testimony was taken about the photograph. (MS 20.) On cross-examination appellant stated that he saw no apartment for rent sign outside the building, that he went into the building and knocked on several doors and after not being able to find the janitor was leaving the building when the police arrived (MS 22-26). Appellant admitted that at that time he had a five inch bonehandled knife and several toy guns in his possession (MS 27-28).

Officer Jack Vigrass testified that he and his partner, Officer Harry Bogel, responded to a call reporting a suspicious man knocking on doors in the hallway at 1257 Wisconsin Avenue, N.W., at about 10:00 a.m. on December 17, 1967. They entered the building and proceeded up the stairs and on the landing between the second and third floors saw the appellant with a bag in his hand. (MS 28-31.) While questioning him as to whether he had a vendors license, Officer Vigrass saw a bonehandled knife with a blade exceeding five inches protruding from his pocket. A Mrs. Bromley, the lady who had reported appellant's presence in the building, told the officers that he

had been there since three o'clock in the morning. There were numerous cigarette butts, crackers and wrappers on the stairway where he was sitting. (MS 32, 33.) Mrs. Bromley also indicated that she had heard him coughing and had smelled cigarette smoke. The lady on the second floor said that she had also heard him in the building. Each time the officers asked him why he was in the building appellant would give a different answer. At that time they placed him under arrest for carrying a dangerous weapon and unlawful entry. (MS 32, 35.)

Officer Vigrass on redirect examination testified that the checks and letters which were the subject of the indictment were recovered from his person at the precinct at a later search (MS 38, 39).

Judge Sirica, after weighing the credibility of the witnesses and considering the information available to the police officers, found that they did have probable cause under the circumstances and denied the motion to suppress. (MS 39, 40).

The Trial

The evidence showed that on December 17, 1966 Officer Kenneth Libby and his partner, Detective James Owens, searched appellant at about 11:00 a.m. at the Seventh Precinct. During that search they found items of mail underneath appellant's clothing against his skin in the small of his back. (Tr. 41-42, 55.) Eight pieces of mail consisting of checks and envelopes and their photostatic copies were marked Government's Exhibits 1 through 8 for identification and entered in evidence after objection by defense counsel that they were seized pursuant to an arrest for which there was no probable cause. (Tr. 44-55, 93.) Items 1, 2, 6, 7, and 8 were in their original envelopes which were sealed but torn open on the side (Tr. 55-57).

On cross-examination Officer Libby testified that appellant was wearing a T-shirt, two sweaters, two short coats, an overcoat and, he thought, two pairs of trousers; therefore he suggested a strip search which uncovered the items of mail (Tr. 59-60). When Officer Libby found the items

of mail they were already open but they were not endorsed. Appellant's name was not on any of the items of mail(Tr. 60).

The next three Government witnesses[1] were the addressees of the mail found on appellant's person. Those witnesses testified that they were receiving mail at certain addresses in the District of Columbia and that they had not received the items of mail (Exhibits 1-8) which were the subject of this indictment at the place designated for the mail to be delivered. They first saw the mail at the police station in the possession of a detective. The witnesses testified that they had not given appellant authorization to receive or open their mail. (Tr. 64-81.)

Postal Inspector Victor Kauffman testified that he had had possession of Exhibits 1-8 since they had been given to him by Detective Owen. Then he gave them to the Assistant United States Attorney on the morning of the trial. He also testified that he had received a complaint from Mr. Wheeler that he had not received his mail for December 10. (Tr. 84-87).

At the close of the Government's case Exhibits 1-8 were offered in evidence. The defense counsel's objection to their admission on the grounds that they were illegally seized was overruled (Tr. 91). His motion for a judgment of acquittal on the grounds that the Government had not made out a *prima facie* case also was denied.

Appellant was the only witness called by the defense. He testified about the circumstances of his arrest. (Tr. 99-108). This testimony was substantially the same as his testimony at the motion to suppress and the preliminary hearing. In addition, however, he stated that Detective Libby was not one of the officers who searched him at the precinct. Appellant denied that he had the items of mail in his possession when he was searched (Tr. 106, 115,

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[1] Richard Stanton did not receive through the mail Exhibit 1, $50.00 bond; Harold Johnson did not receive through the mail Exhibit 2, a gift certificate for $194.34; A. L. Wheeler did not receive through the mail Exhibits 3-8, checks varying in amounts from $550.00 to $7509.48.

119). He also denied ever having been at any of the addresses from which the mail was stolen (Tr. 103, 114).

In rebuttal Detective James Owen testified that he and Detective Kenneth Libby had searched appellant on December 17 and had found Exhibits 1-8 underneath his clothing in the small of his back (Tr. 128, 129, 133). He identified Exhibits 1-8 as the items found on appellant's person on December 17, 1968 because he had marked them with his initials (Tr. 131).

ARGUMENT

I. There was probable cause for appellant's arrest when the officers responding to a report of a suspicious man knocking on doors at 1257 Wisconsin Avenue found appellant in the hallway at that address between the second and third floors unable to give a satisfactory explanation of his presence and with a large bone-handled hunting knife protruding from his pocket.

(MS 29-31, 32, 35)

Appellant contends that his arrest at 1257 Wisconsin Avenue was illegal since there was no probable cause and therefore the fruits of any search incident to the illegal arrest should have been suppressed.

Probable cause must be supported by more than mere suspicion on the part of the officer, but it need not be based on evidence sufficient to sustain a conviction.[2] Probable cause for arrest exists where a police officer "in the particular circumstances, conditioned by observations and information, and guided by the whole of his police experience, could reasonably have believed that a crime had been committed by the person to be arrested." [3]

The facts known to the officers as they entered 1257 Wisconsin Avenue, N.W., coupled with what transpired

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[2] *Bell* v. *United States*, 102 U.S. App. D.C. 383, 254 F.2d 82 (1958).

[3] *Jackson* v. *United States*, 112 U.S. App. D.C. 260, 262, 302 F.2d 194, 196 (1962).

with the appellant when they came upon him in the hallway, gave them ample grounds to believe that one offense had been committed by appellant and that another offense was being presently committed in their presence.

Officers Vigrass and Bogel responded to a call to investigate a suspicious man knocking on various doors in the hallway of 1257 Wisconsin Avenue, N.W. They found appellant on the landing between the second and third floor. When they inquired as to what he was doing on the premises, he first replied that he was looking for a room, then he said he was a salesman selling "old clothes, furniture, and stuff" but he had no vendor's license. When the officers asked him why he picked this building to look for a room since there were no signs indicating a room for rent he then said that he was selling. (MS 29-31.) During the course of the inquiry one of the officers saw, protruding from appellant's pocket, a bonehandled hunting knife with a blade in excess of five inches in a leather case (MS 31-32).

A Mrs. Bromley, who had reported that there was a man in the hallway, said that appellant had been there since three o'clock in the morning. There were numerous cigarette butts and wrappers from crackers on the stairs which would indicate that appellant had been there for a considerable period of time. (MS 32.)

Officers Vigrass and Bogel then arrested appellant for unlawful entry and carrying a dangerous weapon (MS 35). It is clear from these facts that the officers had probable cause to believe that the crime of unlawful entry had been committed and that the crime of carrying a dangerous weapon was being committed in their presence. When all the circumstances are considered the officers would have been derelict in their duties if they had not arrested appellant. Since there was ample probable cause, the arrest was valid and the search incident thereto was reasonable and not violative of appellant's Fourth Amendment rights.

The entire thrust of appellant's argument is based on the testimony educed at the preliminary hearing, the

purpose of which is to determine only "that there is probable cause to believe that an offense has been committed and that the defendant has committed it. . . ."[4] and not to determine whether evidence was illegally seized. The latter determination is within the exclusive jurisdiction of the trial court.[5] Thus the statements of Judge Beard and the limited testimony at the preliminary hearing carry little weight in determining the issue of probable cause. At the hearing on the motion to suppress the additional facts brought to light and mentioned by Judge Sirica were not before the court at the preliminary hearing. Thus appellant's exclusive reliance on the evidence brought out at the preliminary hearing is misplaced.

Appellant also argues that none of the elements of the offense of unlawful entry were present when he was arrested. Appellant was inside the building without authority or the express or implied consent of the owner, the lawful occupant or the person in charge of the premises. These facts certainly constitute a *prima facie* case of unlawful entry. The District of Columbia Court of Appeals in the case of *McGloin* v. *United States*, 232 A.2d 90 (1967)[6] recently affirmed a conviction for unlawful entry on facts similar to, but less compelling than, the facts in this case. There the accused was seen in a four unit apartment house wandering through the halls and on

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[4] Federal Rules of Criminal Procedure, Rule 5(c).

[5] *Giordenello* v. *United States*, 357 U.S. 480, 484 (1958) where the Supreme Court stated:

> By the same token, the Commissioner here had no authority to adjudicate the admissibility at petitioner's later trial of the heroin taken from his person. That issue was for the trial court. This is specifically recognized by Rule 41(e) of the Criminal Rules, which provides that a defendant aggrieved by an unlawful search and seizure may . . . move *the district court* . . . to suppress for use as evidence anything so obtained . . . ." (Emphasis added).

[6] The Court's remarks in *McGloin* distinguishing *Bowman* v. *United States*, 212 A.2d 610 (1965) relied on by appellant are equally applicable to the instant case.

the roof. He was arrested and subsequently convicted of unlawful entry. In affirming the conviction that court recognized ". . . that a member of the public might lawfully enter the lobby or entrance hall for the legitimate purpose of making inquiry or delivery or for some like purpose, it is more than plain that wandering through the building . . . would be against the will of the owner." In the instant case the two officers found a man wandering through the halls of a small apartment building with a large knife in his pocket and unable to satisfactorily explain his presence there. Under these circumstances there was sufficient probable cause to believe that appellant had unlawfully entered the building and therefore the officers' arrest of appellant at that time was justified.

II. The very limited use at the hearing on the motion to suppress of the photograph of the articles found in appellant's bags was not prejudicial to the appellant's case and did not constitute reversible error.

(MS 20, 26, 39, 40)

Appellant alleges that the reception at motion to suppress of the photograph of the numerous articles found during the search of appellant's bags in the hallway of 1257 Wisconsin Avenue was prejudicial and constituted reversible error.

It is unclear how the photograph prejudiced appellant since it was only introduced at the motion to suppress and not at the trial. If appellant is arguing that the introduction of the photograph prejudiced him as to the issue of probable cause, this argument must fail. The appellant is incorrect on two crucial factual matters. First, the photograph was only marked for identification; it was never offered or received in evidence. Judge Sirica immediately limited the use of the photograph because it did not bear on the issue of what information the officers had which led them to arrest appellant (MS 20). The photograph was only referred to once thereafter during the entire proceeding when Judge Sirica asked appellant whether what was shown in the photograph taken at the precinct had been in

appellant's bag (MS 26). The second factual error is that the photograph was not taken at 1257 Wisconsin Avenue before he was arrested; rather it was taken at the precinct after he was arrested when his person and bags were searched. (MS 26). Thus the photograph was no indication that appellant was searched before he was arrested.

The factors leading to the denial of appellant's motion to suppress were set out by Judge Sirica at the close of the hearing on the motion to suppress (MS 39, 40). Not once did he mention the photograph as having any bearing on his decision. It is clear that Judge Sirica considered the photograph of little or no relevance to the narrow issue of whether the officers had probable cause to arrest. Thus no prejudice accrued to appellant through the very limited use of the photograph at the suppression hearing.

III. The remainder of appellant's assignments of error dealing with (a) the trial court's failure to limit the scope of the Government's redirect examination of one of the witnesses, (b) the failure of the trial court to exclude Detective Owen from the courtroom while appellant was being cross-examined, and (c) the instructions to the jury, all of which were unobjected to at trial, are without merit.

(Tr. 66, 68, 150)

Appellant contends that the alleged errors when taken together coalesced to deprive him of a fair trial. None of the alleged errors was significant enough to be objected to by defense counsel below.

The claim that the trial judge's failure to limit the scope of the Government's redirect examination was reversible error must fail. First it is clear that the scope of redirect rests largely in the sound discretion of the trial judge and absent an abuse of such discretion his rulings will not be disturbed on appeal. *Chapman* v. *United States*, 346 F.2d 383 (9th Cir. 1965); cf. *Comins* v. *Scrivener*, 214 F.2d 810 (10th Cir. 1954). Second, Mr. Stanton's redirect testimony, objected to as prejudicial, was

that he had never given appellant authority to receive or open any of his mail (Tr. 68). This testimony was cumulative in that the same testimony had come in on direct when Mr. Stanton testified that he had not given anyone authority to receive his mail for him (Tr. 66).

The failure of the trial judge to exclude Detective Owen from the courtroom during appellant's cross-examination was not error. There is no absolute rule requiring that all witnesses must be excluded from the courtroom while other witnesses are testifying. It is well settled that the exclusion of a witness, at least in the Federal courts, is within sound discretion of the trial judge and absent an abuse of discretion his ruling will not be set aside. *United States* v. *Postma*, 242 F.2d 448 (2d Cir. 1957); *Copeland* v. *United States*, 120 U.S. App. D.C. 5, 343 F.2d 287 (1964); *United States* v. *Cephus*, 263 F.2d 518 (7th Cir. 1959); *Powell* v. *United States*, 208 F.2d 618 (6th Cir. 1953).[7]

Appellant argues that the court's instructions as to what constitutes an authorized mail depository were erroneous.[8] Since no objection to the charge was raised below, appellant is foreclosed from raising this objection before this Court absent plain error. *Kelly* v. *United States*, 124 U.S. App. D.C. 44, 361 F.2d 61 (1966). While this Court may notice "plain errors or defects affecting substantial rights" that were not raised at the trial level, the defect asserted must be substantial—that is, it must have prejudiced appellant's case. This is especially true in light of Fed. Rule Crim. P. 30 which provides in part that

> . . . No party may assign as error any portion of the charge or omission therefrom unless he objects there-

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[7] In the Powell case in addition to holding that the exclusion was a matter for the discretion of the trial judge, the Court of Appeals for the Sixth Circuit stated that the officer in charge of the case was permitted to sit in the courtroom through the trial and advise counsel even though he testified as a witness.

[8] "Under the law an authorized depository for mail includes among other things, a letter box or a mail receptacle or other authorized depository designated by postal regulations." (Tr. 150).

> to before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection. . . .

In the instant case appellant does not allege that the instructions were plainly erroneous. Rather he contends that the charge might have been expanded upon. "The trial judge in her instructions should have commented on the word receptacle and given the jury a better chance to consider whether the mail was in fact taken from an authorized depository for mail" (Appellant's Brief, p. 16). It is clear that even if the instructions did require further clarification for the jury, the instructions, as given, were not erroneous and not prejudicial to the appellant's case.

None of the alleged defects taken singly or in combination were erroneous or prejudicial to appellant's case.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ROBERT P. WATKINS,
Assistant United States Attorneys.

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BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,725

BEVERLY J. RODGERS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court

for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 4, 1968

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Attorney for Appellant
(Appointed by this Court)

QUESTIONS PRESENTED

1. Whether the search made of appellant's belongings before his arrest, a photograph of which was introduced as Exhibit 1 at the hearing upon his motion to suppress evidence, was in violation of his rights under the Fourth Amendment.

2. Whether the search of appellant's person at the Seventh Precinct was incident to an unlawful arrest and hence violated his rights under the Fourth Amendment.

3. Whether the commission of several additional errors, such as permitting redirect testimony of appellee's witness to exceed the scope on cross-examination, allowing a witness for appellee to be present in the courtroom during cross-examination of appellant, and failing to instruct the jury adequately as to the meaning of "authorized depository for mail", constituted reversible error.

This case has not previously been before this Court.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BEVERLY J. RODGERS, Appellant,	)	
v.	)	No. 21,725
UNITED STATES OF AMERICA, Appellee.	)	

BRIEF FOR APPELLANT

I. JURISDICTIONAL STATEMENT

This Court has jurisdiction of the appeal under 28 U.S.C. §1291.

II. STATEMENT OF THE CASE

The appellant, Beverly J. Rodgers, age 74, was apprehended in mid-morning of December 17, 1966, at 1257 Wisconsin Avenue, N. W., Washington, D. C. He was taken to the Seventh Precinct, where, during a strip search, certain items of mail belonging to others were supposedly found upon his person. Appellant was charged with the violation of Section 1708 of Title 18 of the United States Code, dealing with taking articles from an authorized depository for mail and having the same in his possession.

A preliminary hearing was held on December 19, 1966, before Judge Edward A. Beard of the Court of General Sessions. A motion for the return of property and the suppression of evidence (i.e., the mail material) under

Rule 41(e), F.R.C.P., was heard and denied by Judge John J. Sirica of the United States District Court for the District of Columbia on September 1 and 22, 1967. At this hearing, the appellee introduced as Exhibit 1 a photograph of various articles taken from appellant's bags and his person (Tr. motion to suppress 20). Trial of the appellant occurred on September 28 and October 2, 1967, before Judge Burnita Matthews of the District Court, at which trial counsel for appellant renewed his motion to suppress and was again denied. A jury found the defendant guilty on all counts, and the defendant was sentenced on December 1, 1968, to a term of from one to four years. All transcripts of the aforementioned proceedings are a part of this record.

From these transcripts, the events concerning the appellant's arrest are, as follows. The premises, 1257 Wisconsin Avenue, are a three-story apartment house half a block above M Street (Tr. preliminary hearing 10). The front door was unlocked, and the lobby, about six by four feet, was wide open to the public and to callers such as postmen; newsboys, milkmen, icemen, and the like (Tr. preliminary hearing 11 and 12).

The appellant's testimony, which nothing in the record contradicts, is that he had come from Charlotte, North Carolina, the night before the morning of December 17, 1966 (Tr. trial 99). Appellant made his living selling new and used articles (Tr. trial 126). He had something to eat in a restaurant, got in his car, and parked it on M Street in Georgetown. He was looking for a room. He had some of his belongings with him since in case he got an apartment, he could move right in (Tr. trial 100). He entered 1257 Wisconsin Avenue, the door being wide open, and looked for a

sign that might indicate the janitor or owner of the building (Tr. trial 100 and 101). He could not locate either and hearing someone talking on the third floor, went up there and knocked on the door of a Mrs. Bromley (Tr. motion to suppress 24). The appellant asked her where he could find the janitor or owner so that he might rent an apartment or room. Mrs. Bromley replied through the door that she did not know where he could find them (Tr. motion to suppress 14). The appellant thanked her, picked up his two bags, and started to move on, when one slipped out of his hand and everything went all over the stairs (Tr. motion to suppress 14). The appellant put his things back in the bag and started down the stairs, at which point two policemen arrived in response to a call from Mrs. Bromley. The policemen took the appellant back upstairs to Mrs. Bromley. She and her whole family and others came out to see what was going on. According to appellant, Mrs. Bromley said that she didn't open the door for the simple reason that they had been having trouble with teenagers and that she was frightened and called the police to be on the safe side (Tr. motion to suppress 15). According to appellant, Mrs. Bromley also said that if she had known it was an old man, she would have opened the door and talked to him. One of the officers told the appellant to leave the building and not to come back looking for an apartment. The appellant said all right. The other officer ordered the appellant to leave his bags where they were and asked him what he had in them (Tr. motion to suppress 16). The appellant named everything in them, but the officer was not satisfied and took it upon himself to take everything out of the bags and put them on the floor (Tr. preliminary hearing 21, 22; tr. motion to suppress 16; tr. trial 107).

The officers had no warrant to search appellant or to arrest him (Tr. trial 10, 11), and appellant protested the search (Tr. motion to suppress 16). Then one officer told appellant he was under arrest (Tr. trial 107 and 108). Appellant asked the officer what the charge was. The officer replied that he did not know until they get to the police station (Tr. trial 108).

The record does not contradict appellant that his bags were searched before the arrest. However, there is much confusion as to the nature of the charge when it was made. As was stated, appellant testified that the officers did not give him the specific reason for his arrest. The arresting officers, Privates Vogel and Vigrass of the Seventh Precinct, did not appear at the trial but, instead, testified singly at the preliminary hearing and at the motion to suppress. Private Harry Vogel testified at the preliminary hearing (page 5 of tr.) that he told the appellant he was under arrest for unlawful entry. This was denied by the appellant. Private Vogel further testified that after placing him under arrest (for unlawful entry), he noticed several bulges in appellant's pocket and that in the first one he searched, he found a knife and other numerous articles (Tr. preliminary hearing 5). But Private Vogel did not ascribe the knife as the reason he arrested appellant.

The possession of a sort of knife was admitted by the appellant (Tr. trial 107). The appellant testified that the knife was an envelope knife, one of those you find on desks to open envelopes that they have in the coffee shop at the YMCA (Tr. trial 107, 108). The knife was not introduced in evidence in any proceedings herein. Counsel for appellant examined this

"knife" in the storeroom of the property clerk in the Municipal Center and of his own knowledge states that it is a letter opener (Property Report D80640). It is, in fact, a cheap letter opener, having an imitation stag handle and a slightly tapering blade about five inches long and three-eighths of an inch wide with rounded edges and point. It was enclosed in an imitation leather scabbard.

Later, at the motion to suppress, the cause for arrest, if any, seems to have been changed. Private Vigrass testified that a bone-handled hunting knife with a 5 1/2 or 6 inch blade in a leather case, poked out of a pocket as appellant sat his bags down on the steps to talk (Tr. motion to suppress 33). Private Vigrass stated that appellant was arrested for CDW, the knife (Tr. motion to suppress 32) but did not state whether he informed the appellant of the grounds for his arrest. Further, on cross-examination Private Vigrass testified that the appellant was not engaged in doing anything illegal other than standing on the second or third step from the third floor of the building (Tr. motion to suppress 36).

Trial counsel for appellant, Clement Cooper, Esquire, tried to obtain a transcript of the preliminary hearing at the time of the motion to suppress and through the court renewed his efforts at the trial (Tr. trial 98), when he again moved to suppress the evidence. The trial proceeded, and trial counsel did not have the benefit of seeing the clear contradiction between the testimony of Privates Vogel and Vigrass nor of the true basis for appellant's arrest.

Thus, it appears from the evidence that: (1) appellant's bags were searched prior to any arrest; (2) if appellant was arrested on any specific charge, it was for unlawful entry (see argument of the appellee, beginning

at page 14, Tr. preliminary hearing, on this issue only); and (3) if he was arrested for concealing a deadly weapon, he was not so told.

At the preliminary hearing, counsel for the appellant introduced the issue whether the arresting officers had probable cause. Judge Beard ruled that he was unable to pass upon the legality of evidence obtained from an unlawful search and to exclude it from evidence, this being a problem for the District Court (Tr. preliminary hearing 16). But Judge Beard had a definite opinion that "it was very likely an unlawful arrest" (Tr. preliminary hearing 18).

After the scene at 1257 Wisconsin Avenue, during which appellant's person was thoroughly searched, he was led away to the Seventh Precinct. There, he was forced to undergo a strip search, when two detectives connected with this precinct allegedly found the mail material with respect to which the appellant was convicted.

At the trial, counsel for appellee examined the people whose mail appellant allegedly stole. In one instance, on redirect examination counsel for appellee asked a Mr. Richard Hughes Stanton whether he gave appellee permission to accept or open his mail (Tr. trial 68). The cross-examination of Mr. Stanton by counsel for appellant covered only questions concerning the date Mr. Stanton first saw the bond reported stolen and the people who had shown him the bond (Tr. trial 67).

Further at the trial, there was testimony with respect to the type of mail depositories in which the mail allegedly stolen by appellant had been placed. In the case of Mr. Stanton it was an unlocked mailbox mounted on the wall in the vestibule just inside an unlocked front door.

(Tr. trial 66). In the case of Officer Harold F. Johnson, the depository was a table 25 to 30 feet inside the entrance of a rooming house (Tr. trial 72). In the case of Mr. A. L. Wheeler, it was a mailbox located in the back of an exposed vestibule leading to his office on the second floor (Tr. trial 74). Inspector Victor A. Kauffman of the Post Office Department testified that an authorized depository for mail is a "mailbox or any place where any mail is customarily left for delivery to addressees", the basis thereof being a postal regulation (Tr. trial 85). Judge Matthews, in her instructions to the jury, stated that "an authorized depository for mail includes, among other things, a letter box or mail receptacle or other authorized depository designated by postal regulations." (Tr. trial 150).

One of the rebuttal witnesses for the appellee at the trial was Detective James E. Owens of the Seventh Precinct (Tr. trial 128). The testimony of the appellant suggests that Detective Owens was in the courtroom at the time appellant was being cross-examined (Tr. trial 121).

III. STATUTES INVOLVED

Title 18, U.S.C. §1708

Title 22, Section 3102 D.C. Code

Title 22, Section 3204 D.C. Code

Title 23, Sections 301 and 306 D.C. Code

IV. STATEMENT OF POINTS

1. A search was made of appellant's belongings before arrest in violation of the Fourth Amendment to the Constitution. A photograph

thereof was introduced at his motion for return of property and suppression of evidence. Said evidence was prejudicial to appellant and in violation of his rights against self-incrimination.

2. Appellant's arrest for unlawful entry, the only charge for which he may have been arrested, was unreasonable and without probable cause. Hence, his search incident to this arrest was unlawful, and conviction supported by this evidence should be reversed.

3. Reversible error occurred when during the trial the Court permitted testimony on redirect examination beyond the scope of the cross-examination, permitted a rebuttal witness of the appellee to remain in the courtroom during the cross-examination of the appellant, and failed in instructing the jury to clarify the meaning of the term, authorized depository for mail, as set forth in 18 U.S.C. §1708.

V. SUMMARY OF ARGUMENT

1. The Fourth Amendment protects our citizens against searches and seizures that are unreasonable and without probable cause. Such a search and seizure occurred before appellant's arrest, and a photograph of the things seized was introduced at his motion to suppress. The introduction of this photograph violated appellant's rights under the Fourth Amendment.

2. The court below improperly denied the renewal of appellant's motion to suppress evidence. At the time of trial, counsel for appellant was not afforded the opportunity to obtain a transcript of the preliminary

hearing showing a conflict in testimony by the two arresting officers which the District Court would have been obligated to resolve. From the testimony at the preliminary hearing, appellant was arrested for unlawful entry. The facts show no probable cause for this arrest that was in the nature of an arrest for investigation. Appellant's search incident thereto at the Seventh Precinct was in consequence unlawful under the Fourth Amendment.

3. It is clear that the testimony of Mr. Richard Hughes Stanton, witness for the appellee, on page 68 of the trial transcript, was beyond the scope of his cross-examination by counsel for appellant. Furthermore, this testimony by Mr. Stanton supplied one of the missing elements of appellee's case, namely, whether he gave appellant permission to receive and open his mail.

Section 1708, Title 18 U.S.C., applies only for the taking of mail from, among other places, an authorized depository for mail matter. There is great doubt that at least one of the places, a table in a rooming house, from which appellant was supposed to have taken mail constituted an authorized mail depository and the trial judge's instructions to the jury thereon were not satisfactory in defining that term.

It also appears that Detective Owens of the Seventh Precinct was present in the courtroom during appellant's cross-examination. This procedure is strictly contrary to the rule on witnesses.

VI. ARGUMENT

General - The Fourth Amendment

The Fourth Amendment to our Constitution provides that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The history behind this provision is well known and documented. See the dissent by Justice Douglas in Draper v. United States, 358 U.S. 307, 314 (1959). The framers of our Constitution had no desire to subject the citizens of this country to the abuse possible by general warrants, in which the name of the citizen to be arrested was left blank, or by the French equivalent, the lettre de cachet, which emanated from the king and was countersigned by a minister, often to carry out personal vendettas. As the court said at p. 559 in Wrightson v. United States, 95 App. D.C. 390, 222 F.2d 556 (D.C. Cir. 1955):

"Such [unlawful] searches and seizures are the embryo of tyranny* * * Once those safeguards are gone, the supremacy of force is complete* * *."

The purpose of this amendment is to protect a citizen against

"* * *the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense* * *."

Boyd v. United States, 116 U.S. 616, 630 (1886). It is clear that this amendment, because of the breadth of the "due process" clause in the Fourteenth Amendment, applies to actions by either state or Federal officials. Mapp v. Ohio, 367 U.S. 643 (1961).

The Fourth Amendment does not prohibit all searches without a warrant. It is the unreasonable search and the search without probable cause that the Fourth Amendment prohibits. Arrests of individuals and

searches of automobiles can be reasonable when made without a warrant because they may flee in the time required to obtain a warrant. But all searches and arrests must be based upon probable cause, and this exists where

> "'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."

Draper v. United States, supra, at 313; Carroll v. United States, 267 U.S. 132, 162 (1925). Thus, before a police officer can make a search or an arrest, either with or without a warrant, he must show probable cause that a crime is being committed or about to be committed. Gatlin v. United States, 117 App. D.C. 123, 326 F.2d 666 (D.C. Cir. 1963); Wrightson v. United States, supra.; see also Sections 23-301 and 23-306 of the D. C. Code. Very important is the principal that probable cause requires reasonable grounds for belief of guilt, which means more than bare suspicion but less than evidence that would justify condemnation. Brinegar v. United States, 338 U.S. 160 (1949).

It has long been held that a search and seizure without a warrant is justified if incident to a lawful arrest, and the right to conduct the search and seizure under these circumstances extends only to the things under the immediate control of the accused. Preston v. United States, 376 U.S. 364 (1964); Weeks v. United States, 232 U.S. 383 (1914). The basis for this rule is practical. Police officers must have the right to search the accused, to take weapons and other things which might be used to assault the officer and allow him to escape, or to prevent the

destruction of evidence of the crime. It follows that, absent probable cause, if the seizure of the accused's things is not incident to a lawful arrest, the search violates the Fourth Amendment. United States v. Rabinowitz, 339 U.S. 56 (1950); Wrightson v. United States, supra.

Any conviction of the accused as a result of evidence seized in violation of his rights under the Fourth Amendment cannot be sustained. Harris v. United States, 331 U.S. 145 (1947). Our rights under this amendment are enforced by the denial to the prosecution of the use of any material seized in violation thereof.

Finally, the Fourth Amendment is to be liberally construed, and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. Go-Bart Importing Company v. United States, 282 U.S. 344 (1931).

1. Reversible Error Occurred When a Photograph of Appellant's Things Was Introduced at the Motion to Suppress.

From the Statement of the Case it appears uncontradicted that appellant was searched before arrest. His bags containing the numerous articles shown in the photograph introduced as Exhibit 1 in the motion to suppress were laid out in the hall of 1257 Wisconsin Avenue and examined by Privates Vogel and Vigrass of the Seventh Precinct. These contained such articles as watches, jewelry, radios, umbrella, slippers, and other things of a character consistent with his trade as a salesman and with the possession of an inexpensive envelope knife. There is no evidence here that this search was based upon probable cause that a crime was being or about to be committed (see argument 2, infra). And since the search

preceded the arrest, it cannot in this instance be incident to a lawful arrest. There is simply no relationship between the search and the grounds for appellant's arrest. The purpose of the search was patently to obtain evidence upon which a proper arrest might be made. Procedures such as this are highly unconstitutional.

It is difficult to assess the damage done to appellant by this photograph,* but we must assume it was intended by the appellee to be substantial since Exhibit 1 was the only one introduced at the motion to suppress. The innuendo by the appellee is plain that whom the police arrested was a person, suspicious and up to no good because he had two bags full of odd articles and that the police had probable cause to arrest such a person. The aura of suspicion created by this evidence was most certainly a factor in causing Judge Sirica to deny appellant's motion to suppress. In this light, the reception of the photograph in evidence is reversible error.

2. Reversible Error Occurred When the District Court Accepted as Evidence the Mail Material Found on Appellant's Person as Being Violative of his Rights Under the Fourth Amendment.

A search and seizure incident to a lawful arrest and without a warrant is acceptable under the Constitution. But the foundation for any such search must be a lawful arrest, which in turn means one supported by probable cause.

It is clear from the testimony that the appellant was arrested for unlawful entry. The argument of the U. S. Attorney at the preliminary hearing was on this point exclusively. It is extemely hard to see how

There is no real distinction between the introduction of the photograph and the articles themselves.

the appellant had no right to be where he was when arrested. He walked through a wide open door and continued to the third floor trying to find the janitor or owner. This is not a case of an entry into a private home through a door and into hallways that are not public places. The hallway and stairs of 1257 Wisconsin Avenue were accessible to all sorts of people - mailmen, paperboys, milkmen, and the like. None of these would have required permission to enter the front door. There is no reason why appellant should not have been accorded a similar right. When apprehended, appellant was doing nothing unlawful.

Section 22-3102 of the D. C. Code, the misdemeanor for which appellant was arrested, punishes one who, without lawful authority, enters premises against the will, expressed verbally, or by sign of the lawful occupant. Bowman v. United States, 212 A.2d 610 (D.C. Ct. App. 1965). None of the elements of this misdemeanor were conceivably present in this case. No one expressed any objection to appellant's entry into or being in 1257 Wisconsin Avenue. He was at all times in public portions of the building, and he was leaving voluntarily when he was arrested. The facts show this arrest to be wholly unsupported by probable cause.

From the testimony at the preliminary hearing, it does not appear that appellant was either arrested for or told that he was arrested for concealing a knife. It seems that he was arrested to provide an opportunity for a thorough search at headquarters. This is characteristic of the arrest for investigation. Gatlin v. United States, supra. Even if the arrest had been made for concealing a deadly weapon, there was no probable cause. Appellant is an old man, 74 years of age. His bags and

his pockets were crammed with all kinds of salable articles. One of them happened to be a letter opener, which, strangely, the appellee did not introduce in evidence at the motion to suppress or at any other hearing. This letter opener is in no respect a deadly weapon, the carrying of which is prohibited by Section 22-3204 of the D. C. Code. This section does not require all knives to be considered "deadly or dangerous weapons". Degree v. United States, 144 A.2d 547 (Mun. Ct. App. D.C. 1958). And certainly its possession in the pocket of a frail old man is not enough to arouse the apprehension of a police officer that a crime is being committed or about to be committed. The appellant had threatened no one with his letter opener. He was merely leaving the building when he was arrested.

Only when the transcript of the preliminary hearing is read does the nature of appellant's arrest become evident. Trial counsel for appellant, through no fault of his own, was not given the opportunity of seeing a copy of this transcript. The trial court should not have denied counsel's renewed motion to suppress before all the facts concerning appellant's arrest had been brought to light.

Since the arrest of appellant at 1257 Wisconsin Avenue was without probable cause, his subsequent search at the Seventh Precinct was unlawful, and his conviction, based upon possession of the articles found there, cannot be allowed to stand.

3. Reversible Error Occurred When the Trial Judge Permitted an Improper Examination of One of Appellee's Key Witnesses, Failed to Instruct the Jury Satisfactorily as to the Meaning of the Term "authorized depository for mail", and Allowed a Witness for Appellee to be Present in the Courtroom During Appellant's Cross-examination.

Although the following procedures do not seem to have been objected to by counsel for appellant, they seem to have coalesced to make the whole trial prejudicial to him. Testimony on redirect examination by Mr. Richard H. Stanton, which should not have been permitted, squarely supplied one of the bases for the appellee's case. His testimony on redirect examination to the effect that he did not give appellant permission to receive or open his mail, was far beyond the scope of the cross-examination. One of the places from which the appellant was supposed to have stolen mail was from a table inside of a private rooming house. It is very doubtful that this is an authorized mail depository. For example, in United States v. Askey, 108 F. Supp. 408 (S.D. Tex. 1952), letters pushed through a mail slot on a door and taken from the floor were not taken from an authorized depository for mail matter. This conclusion stems from the fact a floor is not a "receptacle" within the meaning of Title 39, C.F.R. Section 153.7(a), as follows:

> "DESIGNATION AS AUTHORIZED DEPOSITORY. Every letterbox or other receptacle intended or used for the receipt or delivery of mail on any city delivery route, rural delivery route, star route, or other mail route is designated an authorized depository for mail within the meaning of 18 U.S.C. sections 1702, 1705, and 1708.

It is submitted that a table in a rooming house is not a receptacle as a matter of law. The trial judge in her instructions should have commented on the word "receptacle" and given the jury a better chance to consider whether mail was in fact taken from an authorized depository for mail.

It would appear from the appellant's testimony that he recognized Detective Owens as having been in the courtroom during his cross-examination. As a general proposition, this procedure places the accused

at a disadvantage and inhibits the giving of fresh and uncalculated testimony.

VII. CONCLUSION

Wherefore, the judgment of the District Court should be reversed as to all counts of the indictment and a new trial ordered.

Respectfully submitted,

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